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No. 81-2350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DAVID H. MOFFET, JR. and JOHN HURSTON,
Petitioners,

v.

STONE MOUNTAIN MEMORIAL ASSOCIATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Whether this Court should review the judgments of the Courts below following a full trial on the merits, which concluded, based on findings of fact and State law, that Petitioners had no vested property right in continuation of their employment with the Respondent Stone Mountain Memorial Association.

II. PARTIES

The Parties to this action are: Petitioners David H. Moffet, Jr. and John Hurston; Respondents Stone Mountain Memorial Association, George M. D. (John) Hunt, III (Association Chairman), Susan W. Anthony (former Association member), Georgia Lieutenant Governor Zell Miller (Association member), Georgia Secretary of State David B. Poythress (Association member), Georgia Commissioner of Industry and Trade W. Milton Folds (Association member), John W. Long (former Association member), T. Stephen Johnson (Association Vice-chairman), George J. Willis (Association General Manager), and Eugene I. Peterson (Association Senior Assistant General Manager).

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V. OPINIONS AND JUDGMENTS BELOW

Pursuant to Rule 34.2 of the rules of this Court, Respondents adopt herein the texts of the opinions and judgments delivered in the Courts below, which are as yet unreported, as they appear at the following pages of the Petition for Certiorari:

Opinion and Order of the District Court....pp. A-1-19

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Order and Judgment of the Eleventh Circuit United States Court of Appeals.....p. A-22

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VI. APPLICABLE PROVISIONS OF LAW AND RULES OF COURT

Pursuant to Rule 34.2 of this Court, Respondent relies on the applicable statutes, regulations, and policies cited in the Petition for Certiorari, with the following additions:

Georgia Laws 1958, pp. 61, 66, Sec. 5(d):

> "Section 5. Powers of the Association. The Association shall have, in addition to any other powers in this Act, the following powers:
>
> * * *

(d) To appoint such additional officers, who need not be members of the association, as the association deems advisable, and to employ such experts, agents, and employees as may be, in its judgment necessary to carry on properly the business of the association; to fix the compensation for such officers, experts, agents, and employees and to promote and discharge same. . . ."

Interim Circuit Rules of the Eleventh Circuit United States Court of Appeals:

"Rule 25. Affirmance without opinion. When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision:

(a) Judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) The evidence in support of a jury verdict is not insufficient;

(c) The order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) Summary judgment, directed verdict or judgment on the pleadings is supported by the record;

and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion."

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VII. STATEMENT OF THE CASE

Petitioners Moffet and Hurston were terminated from their employment with the Respondent Stone Mountain Memorial Association [1] by the Respondent Senior Assis-

[1] The Stone Mountain Memorial Association (hereinafter on occasion referred to as "the Association") was created as a body corporate and charitable institution by Georgia Laws 1958, p. 61, *et seq.* By such legislation the Association was given the power to:

". . . employ such . . . employees as may be, in its judgment, necessary to carry on properly the business of the association; . . . and . . . to promote and *discharge* same. . . ." Ga. L. 1958, pp. 61, 66, Sec. 5(d). (See pp. iv, v, *supra*, emphasis added).

tant General Manager Peterson, acting as the designee of of the General Manager, on October 23, 1979. (Stip. 18, R-213, Petition for Certiorari, at p. A-10).[3] At the time of those terminations, the personnel Policies and Procedures of the Association provided that:

> "All employees serve at the discretion of the General Manager or his designee." (Stip. 5, R-211, Petition for Certiorari, at p. A-6).

Petitioners' complaint was filed on January 30, 1980, alleging a cause of action under 42 U.S.C. § 1983, § 1985(3), and § 1986. Count I alleged an unlawful deprivation of a property right of Petitioners in their employment with the Respondent Stone Mountain Memorial Association. This count also raised allegations of intentional denial of equal protection rights and due process rights, interference with freedom of association, and conspiracy.

Counts II, III, IV, V, and VI alleged conspiracy and going in disguise upon the highway, etc., failure to prevent the effects of a conspiracy, breach of contract, breach of an additional contract, and interference with contract rights, respectively. Each of these counts was dismissed at trial either on stipulation limiting evidence, or for lack of evidence. (R-I-10-20, I-273-274, R-4-16). (As these counts are not raised in the Petition, Petitioners have apparently abandoned the same.)

After the filing of responsive pleadings (R-31-42), the completion of discovery (R-98), and the filing of pre-trial

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[3] All Stipulations of Fact will hereinafter be cited as (Stip. ____, R-____). All other citations to the record will hereinafter appear as (R-____). (R-I-____) and R-II-____) indicate either of the two volumes of trial transcript in the record, such volumes not being numbered with regular (R-____) designations.

submissions (R-137, 160), a three-day non-jury trial was held before the late Honorable Newell Edenfield, Judge of the District Court of the Northern District of Georgia, Atlanta Division, on December 10-12, 1980. (R-2, Petition for Certiorari, at p. A-1). Post-trial briefs were filed by both parties. (R-217, 230, 283).

The evidence and stipulations at trial showed that on August 22, 1966, the Respondent Association first adopted personnel Policies and Procedures. (Stip. 2, R-209, Petition for Certiorari, at p. A-2). The last provision of these personnel Policies and Procedures provided by specific reservation that:

> "These policies and procedures *may be amended* by Association resolution." (Section 13.1, Policies and Procedures, effective August 22, 1966, Stip. 3, R-209, Petition for Certiorari, at p. A-2; emphasis added).

On February 2, 1976, the Association exercised this reserved amendment power to provide for the first time in its Policies and Procedures, *inter alia*, as follows:

> "*Unless otherwise provided* in this policy, the tenure of a permanent employee shall be during good behavior and satisfactory performance of duties as recorded by his performance evaluations." (Policies and Procedures, Section 13.1, Stip. 4, R-209, Petition for Certiorari, at p. A-4)

This 1976 amendment to the Association's Policies and Procedures also provided, in Section 13.5, for dismissal of employees by supervisors or department heads for cause upon notice stating specific reasons for dismissal, and defined the word "cause" for those purposes. Provision was made for an appeal to the General Manager, who was empowered to exonorate an employee from the

charges upon which the dismissal was based. (Stip. 4, R-210, Petition for Certiorari, at pp. A-4, 5).

The amendment power reservation was again exercised by the Association, at its September 11, 1978 meeting, to in fact provide otherwise. (Stip. 5, R-210, 211, Petition for Certiorari, at pp. 5, 6). The foregoing provisions of Section 13.1 of the 1976 Policies and Procedures were deleted at that time by amendment, and substituted in place thereof was the provision that:

> "All employees serve at the discretion of the General Manager or his designee." (Stip. 5, R-211, Petition for Certiorari, at p. A-6).

This provision remained in effect through the date of both Petitioners' dismissals on October 23, 1979. (Stips. 5 and 6, R-210, 211, Petition for Certiorari, at pp. A-6, 10).

It was stipulated that both Petitioners were aware of and acquiesced in the aforementioned amendment to the personnel Policies and Procedures, and made no comment or objection thereto. (R-I-96, 97, R-II-27, II-72; Stip. 17, R-213, 294, Petition for Certiorari, at pp. A-9, 10). On October 23, 1979, the employment of Petitioners Moffet and Hurston was terminated by Respondent Assistant General Manager Peterson, acting as the designee of the General Manager of the Stone Mountain Memorial Association. (Stip. 18, R-213, Petition for Certiorari, at p. A-10). At no time subsequent to the termination of Petitioners' employment with the Stone Mountain Memorial Association did either appeal his termination to the General Manager, nor did they request to meet with him. (R-I-56, I-93-94, I-291).

The trial Court rendered judgment in favor of the Respondents on all counts of the Complaint on April 29,

1981. (R-290-300, Petition for Certiorari, at pp. A-1-21). In that judgment, Judge Edenfield ruled *as a matter of fact and State law* that Petitioners had *no vested property rights* in their employment with the Respondent Association; in that the September 11, 1978 amendment to the personnel Policies and Procedures was clearly authorized by the pre-existing express reservation of the power to amend those policies, as incorporated in the last provision of the original personnel Policies and Procedures in 1966. (Petition for Certiorari, at pp. A-1-19). Noting that the Respondent Association was not required by law to institute *any* personnel policies in 1966, the Court construed the clear and specific reservation of the power to amend those policies as including the power to delete the provisions which had themselves been *added* by amendment *subsequent* to the reservation. (Petition for Certiorari, at p. A-18). The Court further specifically found that the Association *intended* to reserve the power to change the personnel policies in the manner it subsequently did in 1978, and concluded as a matter of law that the language used in the reservation of that power was effective to do so. (Petition for Certiorari, at p. A-18). Judge Edenfield concluded that this reservation of the power to amend therefore defeated and *prevented the creation of any vested property rights.* (Petition for Certiorari, at A-18, 19).

Petitioners appealed to the Eleventh Circuit Court of Appeals. After the filing of extensive briefs and reply briefs, and after oral argument, the Eleventh Circuit Court of Appeals, in a *per curiam* order, affirmed the District Court's order without opinion, under Rule 25 of the Eleventh Circuit. (Petition for Certiorari, at A-22). Rule 25 of the Eleventh Circuit specifies that the Court may affirm without opinion in several circumstances,

only one of which would be relevant to this case, that being:

> "(a) Judgment of the District Court *is based on findings of fact that are not clearly erroneous* . . . and the Court also determines that no error of law appears and an opinion would have no precedential value . . . ." (emphasis added) (See p. v, *supra*).

Petitioners subsequently petitioned for a rehearing and filed a suggestion for rehearing *en banc*, both of which were denied. (Petition for Certiorari, at A-23, 24).

VIII. SUMMARY OF ARGUMENT

The decisions of the Courts below deal solely with an application of State law to the facts, are confined exclusively in scope and effect to the facts of this case, involve no issue of national import, were correctly decided on their merits, and do not conflict with any decisions of this Court or other Circuit Courts of Appeal. Therefore, this case is not an appropriate one for review by this Court on certiorari.

IX. ARGUMENT, INCLUDING CITATION OF AUTHORITIES

A. There is no conflict between the decisions below and prior decisions of this Court or the Circuit Courts concerning the scope of a reserved power to "amend."

In order to claim entitlement to procedural due process with respect to loss of employment in cases such as this, the Petitioners must show they have been deprived of an interest encompassed within the Fourteenth Amendment's protection of "liberty" or "property." *Board of Regents v. Roth*, 408 U.S. 564 (1972). Continued employ-

ment by public agencies such as the Respondent Stone Mountain Memorial Association is not, without more, a liberty interest protected by the due process clause of the Fourteenth Amendment, especially when there is no showing of any restriction on Petitioners' freedom to seek a job elsewhere. *Roth, supra,* 408 U.S., at 575, citing *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895-896 (1961). Likewise, the same conclusion is applicable to the *termination* of a public employee who is terminable at will according to the conditions of his present employment, without some similar showing of restriction on his liberty to seek employment elsewhere. *Bishop v. Wood,* 426 U.S. 341, 348 (1976).

Under the rulings of this Court in *Roth, supra,* such property interests:

> ". . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as State law. . . ." 408 U.S., at 577.

More recently, in *Bishop v. Wood, supra,* the Court reiterated this principle:

> "A property interest in employment can, of course, be created by ordinance, or by an implied contract. [note omitted] *In either case, however, the sufficiency of the claim of entitlement must be decided by reference to State law.*" (citing *Roth, supra.*) (emphasis added) 426 U.S., at 344.

See also, Glenn v. Newman, 614 F.2d 467, 471 (5th Cir. 1980); *United Steelworkers of America v. University of Alabama,* 599 F.2d 56, 60 (5th Cir. 1979).

At the oral argument before the Eleventh Circuit Court of Appeals, counsel for Petitioners conceded upon questioning from the Court that Petitioners' entire case

boils down to the interpretation which the Georgia courts would place upon the scope of the Respondents' pre-existing reserved power to "amend" any of their personnel policies and procedures by subsequent Association Board action. Petitioners below, as in their Petition for Certiorari, have cited out of context only a spattering of headnotes to decisions which, in certain specific circumstances, have restrictively interpreted the scope of the word "amend." For every such restrictive interpretation, there are numerous broader interpretations which include in the various forms of a reserved power to "amend," the power to *delete* as well as *add* provisions to a policy or statute. *See, e.g., Christian Feigenspan, Inc., v. Bodine*, 264 F. 186 (D.N.J. 1920), *affirmed sub nom, Rhode Island v. Palmer*, 253 U.S. 350 (1920).

In seeking to invoke the certiorari jurisdiction of this Court, however, Petitioners assert in their petition that the decision of the District Court below, as affirmed by the Eleventh Circuit, conflicts in its interpretation of the scope of the word "amend" with a prior decision of this Court. *Phillips Petroleum Company v. Jenkins*, 297 U.S. 629 (1936). Petitioners quote only from one paragraph of that opinion in an attempt to argue that this Court ruled for all time that any power to "amend" can only include the *addition* of substantive provisions to a policy or statute, and that such power can *never* authorize the *deletion* of substantive *non-vested* provisions. The District Court and the Eleventh Circuit summarily rejected this overly restrictive and novel interpretation.

An examination of *Phillips Petroleum* discloses, however, that the issue before that Court had nothing whatsoever to do with a general definition of the scope of a reserved power to "amend." *Phillips Petroleum* dealt

with a statutory scheme in the State of Arkansas which subjected foreign corporations and domestic corporations to a statutory reversal of the traditional fellow-servant doctrine in negligence actions brought by employees of certain types of corporations. An equal protection challenge was lodged against this statute, claiming that the Fourteenth Amendment equal protection and due process guarantees were violated, in that the statute applied only to corporations and not to noncorporate employers.

The language cited by Petitioners in the case at bar is extracted out of context from a discussion of the scope of the power of the Arkansas legislature to require subsequent amendments to corporate charters of corporations doing business in that state. This Court, while upholding the general application of the statute to both domestic and foreign corporations, held that power to require amendments to corporate charters could not be exercised so as to destroy *vested rights* of corporations already doing business in the state.

On this first point, *Phillips Petroleum* is clearly distinguishable from the case at bar, in that the late Judge Edenfield ruled below that as a matter of *fact and State law* Petitioners *had no vested property interests* in continued employment with the Stone Mountain Memorial Association. This ruling was based in part upon facts found by the Court from the trial of the case concerning the intent of the Respondent Association in reserving the power to amend its personnel policies and procedures, even prior to the addition of the so-called Merit System ten years after that reservation. (Petition for Certiorari, at A-18, 19). Since Judge Edenfield ruled as a matter of fact and law that the Petitioners had no vested property interest in their employment, the language quoted by Petitioners from *Phillips Petroleum* does not apply.

Phillips Petroleum is distinguishable on several other grounds as well. The Court in that case specifically stated that the "sole question" before it was whether the statutory reversal of the fellow-servant doctrine violated the equal protection provisions of the Fourteenth Amendment due to the fact that the statute in question did not apply to noncorporate employers. 297 U.S., at 633. Further, *Phillips Petroleum* dealt with a reservation of power to amend where the limitation on the statutory power to amend *specifically accompanied* the power *in the statute.* The Court noted that the statute being interpreted provided that:

> "[a]mendment may only be made whenever in the opinion of the general assembly that charter 'may be injurious to the citizens of this State' and then only 'in such manner, however, that no injustice shall be done to the corporators.' " 297 U.S., at 636.

In the case at bar, there is no such limitation included in the power reserved by the Stone Mountain Memorial Association in 1966 to subsequently amend its personnel Policies and Procedures by board resolution. That power reads in its entirety as follows, without limitation:

> "These policies and procedures may be amended by Association resolution." (Section 13.1, Policies and Procedures, Stip. 3, R-209, Petition for Certiorari, at p. A-2).

Upon review of the *Phillips Petroleum* case, therefore, it is readily apparent that in no manner do the decisions below of the Eleventh Circuit Court of Appeals and the late Judge Edenfield of the Northern District of Georgia conflict with a prior decision of this Court.

B. This case does not present an appropriate question for the exercise of the Court's certiorari power.

As previously noted, counsel for Petitioners has conceded in his brief and in argument before the Eleventh Circuit Court of Appeals that the entire case at bar rises and falls on the permissible scope of the term "amend" as applied to the facts in this case. It is further undisputed under the rulings of this Court in *Roth, supra,* and *Bishop, supra,* that such determination is peculiarly a question of State law. Judge Edenfield carefully examined State law prior to his ruling that the Respondent Association's reservation of the power to "amend" its personnel Policies and Procedures was broad enough to authorize the 1978 Association resolution. (Petition for Certiorari, at pp. A-17-19). As such, Judge Edenfield's order is simply an *application of State law to the facts.* This case is not, therefore, an appropriate one for the exercise of this Court's certiorari powers of review, in that the Court does not normally grant certiorari to review evidence and discuss specific facts. *United States v. Johnston,* 268 U.S. 220 (1925).

Respondents submit that this case is an inappropriate one for the exercise of this Court's certiorari powers for the further reason that the decision below has no national, regional, or state importance. Since the entire decision of the District Court turns on the *factual* application of the term "amend" to the personnel Policies and Procedures of one specific employer, and further is limited even with that employer's work force to employees who were hired prior to September 11, 1978, the order and decision of Judge Edenfield only *potentially* affects a mere handful of

individuals.[4] Other cases with other employers in other localities would of course turn on the particular facts and language of reservations of the power to amend in those particular cases.

As previously noted, the legal issue concerning the scope of the term "amend," as it pertains to the reservation of the power of amendment by the Respondent Association, has been thoroughly briefed both in pre-trial and post-trial briefs submitted to Judge Edenfield in the District Court, and in briefs, reply briefs, and oral argument before the Eleventh Circuit Court of Appeals. Since, as shown above, there is no conflict with prior decisions of this Court, Respondent submits that the reasoned judgments of the lower Courts should not be disturbed on certiorari, turning as they do on issues of fact and application of State law. The Eleventh Circuit Court of Appeals recognized this exercise of judicial economy in affirming the case under its Rule 25, providing for affirmance without opinion when the judgment of the District Court is based on findings of fact that are not clearly erroneous and where the Court also determines that no error of law appears and an opinion would have no precedential value. See p. v, *supra*.

Therefore, Respondent respectfully urges that this case is not an appropriate one for exercise of this Court's certiorari powers.

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[4] Even amongst the handful of potentially affected persons, only three may *actually* be affected by the outcome of this case; the two Petitioners in this case and a plaintiff in a subsequent identical case, which was filed by Petitioners' same counsel after the District Court order in the case at bar, and which has been stayed pending this Court's decision on the Petition for Certiorari in this case. *Smith v. Stone Mountain Memorial Association*, N.D.Ga., C.A. No. 81-1834A.

X. CONCLUSION

For the reasons stated above, Respondents respectfully submit that the Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, THOMAS D. WATRY, Assistant Attorney General for the State of Georgia, certify that I have served three (3) true and correct copies of the foregoing RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI upon Petitioners, through their counsel, in accordance with Rule 28.3 of this Court, by depositing same in a United States mailbox, with adequate pre-paid first-class postage affixed thereto, addressed to:

Fletcher Thompson
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300 Interstate N. Parkway
Suite 329
Atlanta, Georgia 30339

This _____ day of _____, 1982.

THOMAS D. WATRY
Counsel for Respondents